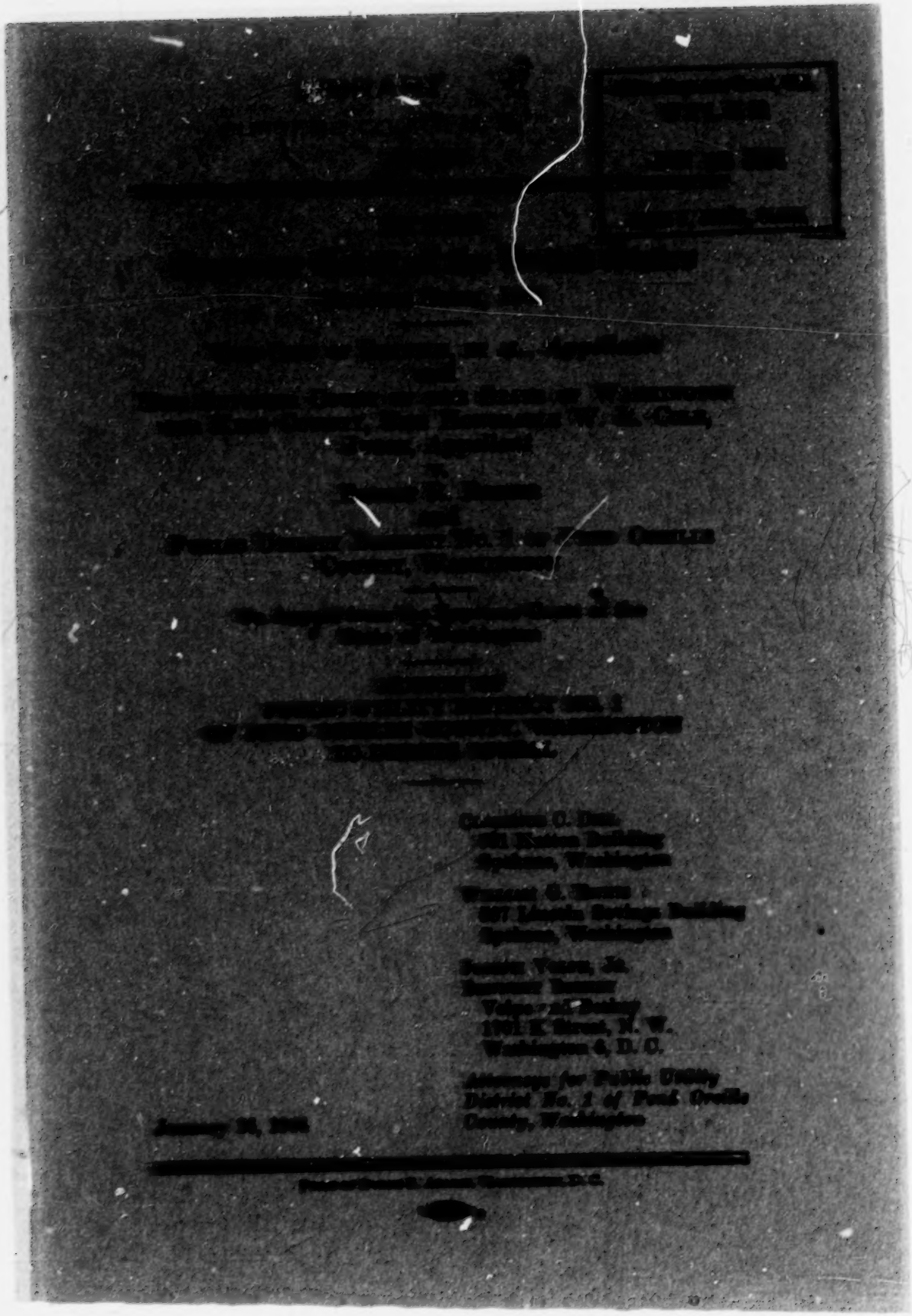


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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 677

THE CITY OF SEATTLE, ET AL., *Appellants*

and

THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY, THE HONORABLE W. R. COLE, JUDGE, *Appellant*

v.

ROBERT R. BEEZER

and

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON

On Appeal from the Supreme Court of the State of Washington

MOTION OF PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON TO DISMISS APPEAL

The appeal which is now before this Court is merely an appeal from a mandamus order directing the trial court to proceed with the trial, as previously directed. The mandamus is simply an order to carry out the Washington Supreme Court's previous direction to try

the case of the taxpayer, Beezer, against the City of Seattle, and determine whether Seattle, in defiance of a state statute, may condemn properties of a public utility district (PUD) if the evidence shows that they are electric properties which the state statute has forbidden cities to condemn.

Both Seattle and the PUD are municipal corporations of the State of Washington. They are both engaged in the electric power business. The Washington legislature passed this intrastate law to prevent a city from interfering with a public utility district's electric business and development of power resources. In short, the legislature passed this law to compel the cities of the State to let the PUD's alone.

This appeal should be dismissed, and on each of the following grounds:

(1) No basis exists for an appeal as of right in this case.

(2) The judgment being appealed from is not final, as required by 28 U.S.C. § 1257, but is an interlocutory order which does not deprive Seattle of any right Seattle holds as a licensee under the Federal Power Act.

(3) Even apart from the statutory question as to finality of judgment, the judgment being appealed from presents this state court taxpayer's suit at such an interlocutory stage that this Court should not exercise any power of review.

(4) This appeal has become moot: the trial court has already complied with the mandamus order by holding the trial; it now has rendered a decision that some of the PUD properties are electric properties within the meaning of the Washington statute but

that Seattle may nevertheless condemn them under the federal supremacy doctrine.

(5) No substantial federal question is presented by the judgment being appealed from.

(6) The judgment being appealed from rests on an adequate nonfederal basis.

In these circumstances, Seattle is not entitled to the dispensation of 28 U.S.C. § 2103, which directs this Court to treat appeal papers as a petition for certiorari when an appeal "is improvidently taken . . . in a case where the proper mode of a review is by petition for certiorari". But if the Court nevertheless were to treat Seattle's appeal papers as a petition for certiorari, then the reasons specified above—and other reasons as well—would call for denial of certiorari.

1. NO BASIS EXISTS FOR AN APPEAL AS OF RIGHT IN THIS CASE

Appeals as of right from state courts to this Court are narrowly limited, by 28 U.S.C. § 1257, to two classes of cases—(1) "where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity"; and (2) "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity". Nothing brings the present case within either the first or the second of these two appeal categories. No decision has been rendered against the validity of the Federal Power Act. Nor is the case one where the validity of the Washington statute, RCW 35.84.030, has been drawn in question and the decision has been in favor

of its validity. Accordingly, no basis exists for an appeal as of right.

Seattle's jurisdictional statement makes no effort to comply with the requirements of this Court's Rule 14(1)(d), which requires a specific showing—and with specific references to the places in the record—"as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court". Thus the case is one where the appellant has "failed to meet his burden of showing that jurisdiction by appeal was properly invoked". *Sweezy* v. *New Hampshire*, 354 U.S. 234, 236. The fact is Seattle could not comply; the record simply does not contain anything which would justify being cited to support Seattle's assertion that an appeal as of right is available in this case.

It is not enough that claims of federal right, privilege or immunity were made, such as might be sufficient to support this Court's jurisdiction on certiorari. This Court has ruled on innumerable occasions that the statutory authorization for an appeal as of right is far more limited and more specific. See, e.g., *Charleston Assn.* v. *Alderson*, 324 U.S. 182, 185-187; *Raley* v. *Ohio*, 360 U.S. 423, 435; *Slagle* v. *Ohio*, 366 U.S. 259, 264; *Union National Bank* v. *Lamb*, 337 U.S. 38, 39.[1] As the Court held, for example, in *Hanson* v. *Denckla*, 357 U.S. 235, 244:

> "But in the state court appellants . . . did not object that the statute was invalid as applied, but

[1] In *Union National Bank* v. *Lamb*, the Court emphasized that certiorari not appeal, is the route by which questions involving the scope to be given to a prior judgment shall be brought to this Court.

> rather that the effect of the state court's exercise of jurisdiction in the circumstances of this case deprived them of a right under the Federal Constitution. Accordingly, we are without jurisdiction of the appeal and it must be dismissed."

Seattle's casual observation in the jurisdictional statement (J.S., p. 13) that the Washington Supreme Court rendered judgment "that a state statute, RCW 35.84.030, invalidates section 21 of the Federal Power Act", bears no resemblance to anything which the Washington Supreme Court actually said or did.

Moreover, no question coming within either of the two appeal categories was tendered in the notice of appeal to this Court. The pertinent excerpt is not referred to in Seattle's jurisdictional statement; accordingly, we are furnishing in Appendix A hereto (p. 37, *infra*) the entire "Questions Presented" portion of Seattle's notice of appeal. The notice of appeal raised questions (1) whether the judgment of the Court of Appeals may be collaterally attacked or was conclusive upon the state proceeding; (2) whether the issue raised by this taxpayer's action was rendered moot by the federal proceeding; and (3) whether Seattle can acquire by condemnation under Section 21 of the Federal Power Act lands owned by the PUD or whether this power is overridden by the Washington statute. This makes it plain that—consistently with the proceedings below—the notice of appeal did not set forth or comprise therein any question which qualifies under either of the two categories permitting appeals as of right to this Court from a state court. And as this Court's Rule 14(2) specifies, "Only the questions set forth in the notice of appeal or fairly comprised therein will be con-

sidered by the court". See, e.g., *Head* v. *New Mexico Board*, 374 U.S. 424, 432, note 12.

Indeed, even if it were permissible for an appellant to avail himself of new questions raised for the first time in a jurisdictional statement, it is apparent that the reformulation of the questions presented, as Seattle now sets them forth in the jurisdictional statement (J.S., p. 4),[2] still does not present questions which would support an appeal as of right.[3]

Accordingly, the present appeal should be dismissed.

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[2] This Court's Rule 15(1)(c)(2) states that, while the phrasing of the questions presented need not, in the jurisdictional statement, be identical with that set forth in the notice of appeal, nevertheless "the jurisdictional statement may not raise additional questions or change the substance of the questions already presented". When Seattle sought a stay from Mr. Justice Douglas (who denied the application on November 9, 1963), the opposition filed by this appellee showed that no appeal as of right would lie. This may well have stimulated Seattle's effort—belated and untimely as it is—to seek to use the jurisdictional statement as an occasion to reformulate the questions presented. In any event it is plain that the effort is ineffectual—not only because it comes too late, but also because even if such formulation of the issues had been made by Seattle at the outset of the litigation, it would not have brought the case within the appeal provisions.

[3] The two cases on which Seattle relies (J.S., p. 3) to support an appeal as of right are cases which furnish no support. *Hendersonville etc. Co.* v. *Blue Ridge Ry.*, 243 U.S. 563, arose several years before the Judiciary Act of 1925 brought into effect the presently-existing curtailment of this Court's obligatory jurisdiction on appeal; the case involved merely a claim of federal right, of a type which then was cognizable on writ of error but today would be cognizable only on petition for certiorari. *Mercantile Nat. Bank* v. *Langdeau*, 371 U.S. 555, is equally irrelevant; there the record apparently satisfied this Court that the Texas courts deemed the validity of the Texas venue statute as applied to have been drawn in question and that the Texas Supreme Court's decision was in favor of validity.

2. THE JUDGMENT BEING APPEALED FROM IS NOT FINAL

The non-finality of the judgment being appealed from stands as a jurisdictional barrier to review either on appeal or on certiorari. 28 U.S.C. § 1257.

The judgment being appealed from (J.S., pp. A-12, A-13, A-14, A-15) is wholly interlocutory; it is an order by the Washington Supreme Court that the state trial court obey the Washington Supreme Court's earlier direction to proceed with the trial.

A. This Case is Wholly Different from Curry and Langdeau

Both Seattle (J.S., p. 3) and the Government (Mem. Amicus, pp. 10-12) cite two decisions which this Court rendered last term, *Mercantile Nat. Bank* v. *Langdeau*, 371 U.S. 555, and *Construction Laborers* v. *Curry*, 371 U.S. 542, and contend they sustain and establish their position. But neither decision supports finality in this case.

In *Curry*, an employer sought a temporary injunction against the picketing of his business by a union. The lower state court refused to grant the injunction on the ground that the National Labor Relations Board had exclusive jurisdiction over the dispute. The Georgia Supreme Court determined that the Labor Board did not have exclusive jurisdiction and ordered the trial court to grant the temporary injunction. The Georgia Supreme Court had thus prohibited the union from doing acts which it had a right to perform under federal law. The Georgia decision was final insofar as the union's right under the federal law was concerned.

Curry is clearly distinguishable from the present case. Here the writ of mandamus which issued October 7, 1963, cannot be considered final as taking from

Seattle any right it possesses as a licensee of the Federal Power Commission. The Washington Supreme Court's order did not prevent Seattle from going ahead with construction work on the Boundary project, nor did it interfere with the judicial proceeding Seattle had instituted to condemn the PUD's properties. Those are rights which Seattle claims to hold as a licensee. Whatever Seattle received by its license, Seattle still possesses.

In *Curry* the Georgia Supreme Court's order to the trial court to issue the temporary injunction was final so far as taking from the union a right conferred on it by federal law. This Court's opinion shows that for all practical purposes the litigation had been terminated by the proceedings held in the Georgia Supreme Court on the temporary injunction (371 U.S. at 550-553). In addition, experience had taught the lesson that the issuance of a state court temporary injunction in a labor dispute might effectively dispose of the petitioner's right to review in this Court as well as his right to a hearing before the Labor Board (371 U.S. at 550); and this Court concluded that "postponing review would seriously erode the national labor policy requiring the subject matter of respondents' cause to be heard by the National Labor Relations Board, not by the state courts" (371 U.S. at 550). The impact of such considerations, in the historical context of federal-state relationships in the field of labor disputes, was emphasized again by the Court only the other day in *Liner* v. *Jafco, Inc.*, No. 43, decided January 6, 1964.

In the present case, on the other hand, the question whether Seattle's claims of a right to condemn all property necessary for the Boundary project are limited by this state statute is yet to be determined.

After a trial on the merits the trial court (see p. 17, *infra*) now has ruled that the state statute is not effective to prevent Seattle from having a right to condemn the PUD's properties, even though some of those properties are covered by the statute. The case is now moving in regular course to the Washington Supreme Court for review of the final judgment on the merits; and this fact makes it evident how readily available is the normal channel of appellate review.

In *Langdeau*, a receiver for a Texas insurance company had brought an action in fraud in the state court in Travis County, Texas, against two national banks which were located in Dallas County. The National Banking Act, 12 U.S.C. § 94, gave these banks an immunity from suit in the state courts of Travis County. But nevertheless, the Supreme Court of Texas ordered the trial court to proceed with a determination of the merits. That order deprived those banks immediately of a federal privilege and immunity. They were entitled to enjoy the immunity which the federal statute granted them. The order subjected those banks to a lawsuit in a prohibited venue. That order, in itself, was a violation of the very privilege and immunity which the federal statute was designed to protect. As in the *Curry* case, there was nothing inconclusive or speculative about the decree of the Texas Supreme Court insofar as the federal privilege and immunity of the banks were concerned. The decree of the Texas Supreme Court conclusively deprived them of those rights. They had nowhere to go except to this Court. Here again, as in *Curry*, they could look only to this Court for redress.

Although in both *Curry* and *Langdeau* the cases had not been fully determined on their merits in the state

courts, yet insofar as the federal rights and privileges of the parties were concerned, both state court decisions were final. Parties in both cases were being immediately deprived of rights specifically conferred on them by federal law, and in both cases their possibilities of redress through state courts had been exhausted.

But such is not the case with Seattle. The Federal Power Act does not grant to licensees an immunity from suits under state law which are otherwise cognizable in the state courts. The alleged federal right or privilege for which Seattle seeks protection in this Court is its right to carry out the powers bestowed upon it through its FPC license. The courts of Washington have not finally determined any deprivation of such claim of right, either permanently or temporarily. On the contrary, the *Beezer* litigation has not deterred Seattle from carrying out the purported powers granted by its license. In its jurisdictional statement Seattle specifically called attention to the fact that it has been going forward with work at the Boundary dam site according to the schedule which the FPC made for construction. Seattle says (J.S., p. 12):

> "In order to have any hope of meeting this deadline, it was necessary for the City to proceed with construction as quickly as possible. Many construction contracts involving access, clearing and other work for the Boundary site are finished or in process at a cost of about $6,000,000 and notices to proceed have necessarily been given on contracts covering turbines, generators and other equipment totaling over $13,000,000."

It may be added that Seattle has carried on its work on the Boundary project all through the trial and will continue the work during the period of appellate re-

view. Nothing in the writ of mandamus prevented or interfered with Seattle's exercise of any right, or claimed right, under the Federal Power Act.

Nor has the writ of mandamus deprived Seattle of going ahead with its judicial proceeding to condemn the properties of the PUD. Seattle filed a condemnation suit in the federal district court for the Eastern District of Washington in March 1963. Motions have been filed, argued and ruled upon. That court refused to stay proceedings to await the result of the trial of this case in the state court. The pretrial hearing is set for February 25, 1964, and the trial for April 6, 1964. Thus Seattle is proceeding to exercise every right it claims is conferred upon it as a licensee under the Federal Power Act.

In *Curry* and *Langdeau*, the test of finality was whether the judgments had finally deprived the petitioners of a federal right. In those cases the Georgia and Texas state supreme court judgments did finally take away certain rights granted under federal law. The Washington Supreme Court judgment has not finally determined any of Seattle's rights under the Federal Power Act; and the trial court's subsequent decision, after trial on the merits, has sustained Seattle's right to condemn the PUD's properties. If the Washington Supreme Court does reverse the trial court, a petition for certiorari by Seattle might then be in order.

B. This Mandamus Is Not an Independent Proceeding

The other line of decisions on which Seattle (J.S., p. 3) and the Government (Mem. Amicus, pp. 12-13) are now relying to establish finality consists of situ-

ations where a mandamus proceeding has been regarded as distinct and independent.

From time to time cases have arisen where, as here, a state court mandamus or prohibition application is filed in connection with already-pending state court litigation. This Court in some situations has accepted as sufficiently "final" a state court judgment on such an application for an extraordinary writ where the judgment had the effect of allowing or directing the main litigation to proceed to trial. In finding the requisite finality, this Court's ground has been that the prohibition or mandamus proceeding was to be regarded as a distinct and independent judicial proceeding. *Bandini Petroleum Co.* v. *Superior Court,* 284 U.S. 8; *Rescue Army* v. *Municipal Court,* 331 U.S. 549, 565-568, and cases cited; *Pacific Coast Dairy* v. *Dep't,* 318 U.S. 285; *Madruga* v. *Superior Court,* 346 U.S. 556, 557, note 1; *Pan American Petroleum Corp.* v. *Superior Court,* 366 U.S. 656.

But the mandamus in the present taxpayer's suit is entirely different from the cases in which this Court has found the requisite finality. This mandamus grew out of the fact that the trial judge refused to do what the Washington Supreme Court had already told him to do. Thus the mandamus application is not in any sense distinct and independent from the main proceeding. Long before this mandamus application became necessary, the main proceeding in this taxpayer's suit already had been before the Washington Supreme Court on appeal from the trial court's summary dismissal of Beezer's complaint. By its initial decision of July 12, 1962, the Washington Supreme Court had reversed, adjudging that this case must proceed to trial (J.S., p. C-1). Its decision expressly

stated that if, after a trial, the trial court found that the PUD property is covered by the Washington statute which forbids Washington cities to condemn such properties of a public utility district, then "we do not presume to suggest to the trial court what its action should be, because, as we have indicated, the city may find that if it has no power of condemnation, it may still be possible to acquire the property by negotiation and proceed under its license; and it should not be precluded from so doing" (J.S., p. C-5).

Seattle's subsequent motion resulted in a second opinion from the Washington Supreme Court, dated October 2, 1962, adhering to the initial decision (J.S., p. D-1). The Washington Supreme Court issued its remittitur November 20, 1962, remitting the case for further proceedings in accordance with its opinion and directing that costs abide the final determination of the cause (R. 0077). This judgment, remanding the case for trial on the merits, was interlocutory. Because of the lack of finality, Seattle could not have brought the judgment to this Court for review (see, e.g., *Bostwick* v. *Brinkerhoff*, 106 U.S. 3; *Cincinnati Street Railway Co.* v. *Snell*, 179 U.S. 395; *Southern Pacific Co.* v. *Eufrazia*, and *Southern Pacific Co.* v. *Eelk*, 351 U.S. 493), unless the whole body of law as to finality of judgments were to be discarded. Moreover, the judgment was one which Seattle did not even attempt to bring to this Court for review within the time prescribed by law.

The trial court declined to proceed with the trial despite this express direction it had received from the Washington Supreme Court. Beezer and the PUD accordingly asked the Washington Supreme Court to

mandamus the trial court. The mandamus application (R. 0078-0083) sought an order requiring the trial court to proceed with the trial of the case exactly as the Washington Supreme Court, by its interlocutory judgment, already had ordered. In deciding the mandamus application on July 18, 1963, the Washington Supreme Court directed that the trial court "should proceed in accordance with our former direction" (J.S., p. A-7). On October 7, 1963 the Washington Supreme Court issued its judgment to that effect, now being appealed from, and again provided that costs were to abide the final determination of the cause (J.S., pp. A-12, A-13, A-14, A-15).

Under these somewhat unusual circumstances, where the mandamus application is for the purpose of compelling the trial court to follow a previously-issued direction to proceed with a trial, the mandamus proceeding is not a distinct and independent proceeding within the meaning of this Court's prior decisions; the judgment is not properly to be deemed a final judgment. Finality under 28 U.S.C. § 1257 is "a question of purely federal law", *Gotthilf* v. *Sills*, 375 U.S. 79, 80. Applying this Court's thought in *Di Bella* v. *United States*, 369 U.S. 121, 131, it seems clear that, "in the wake of such proceedings", the Washington Supreme Court's order granting the mandamus application was "truly interlocutory"; it was entirely incidental to the main proceedings in the taxpayer's suit which were "then fairly in train". An interlocutory judgment does not become converted into a final judgment, within the meaning of 28 U.S.C. § 1257, merely because a trial court, by refusing to follow prior instructions to proceed with a trial, makes it necessary for those prior instructions to be buttressed by mandamus.

Indeed, if a judgment such as the one involved in this case were treated as final, then the strong Congressional policy against review of non-final state court judgments would be seriously impaired. Seattle's effort to bring the case to this Court for review at this stage runs counter to "the policy against premature constitutional adjudication"; it also ignores the principle that the "constitutional question necessary for decision will not be isolated until the precise pinch of the order on the appellant is known". See Mr. Justice Douglas' concurring opinion in *Republic Gas Co.* v. *Oklahoma*, 334 U.S. 62, 73-74. The precise nature of the order to be entered against Seattle—or even whether the Washington Supreme Court will determine that any order at all should be entered against Seattle—cannot be known until this taxpayer's suit has been completed.

For reasons basic to our federal system Congress decided, at the very beginning of our history as a nation, that only final judgments shall come here from the state courts.

The final judgment requirement unquestionably is sometimes an inconvenience or a hardship to litigants who would like to obtain an earlier review. But in balancing this consideration against the weighty factors on the side of not accepting review at an interlocutory stage—factors such as the importance of preventing piecemeal review, the elimination of the delays incident to interlocutory appeals, the avoidance of premature constitutional adjudication, and the minimizing of conflict between the state and federal courts—Congress has been steadfast in keeping the finality requirement as a jurisdictional prerequisite for this Court's review of state court judgments. As

the Court said in *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 124: "This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our Federal system."

There are, moreover, no special or unusual provisions in the Federal Power Act which would justify any suggestion that the general finality requirement of 28 U.S.C. § 1257 has somehow been *pro tanto* repealed by implication for cases such as the present one. The Government (Mem. Amicus, pp. 11-12) now claims that the possibility of state court litigation, even when instituted by persons who were not parties to the federal licensing proceeding, might unduly interfere with Congressional objectives manifested in the Federal Power Act. But if Congress were to agree that such a possibility really overrides the fundamental considerations supporting the final judgment requirement, then it would be a simple enough matter for Congress to amend 28 U.S.C. § 1257 so as to allow interlocutory state court judgments to be brought here in such cases. This is a step which Congress never has taken.

Instead of looking to this Court for such a fundamental change in the law, those who are dissatisfied with the finality policy prescribed by 28 U.S.C. § 1257 should address their arguments to Congress. From time to time Congress has modified the finality requirement to permit certain classes of interlocutory appeals from the lower federal courts.[4] But it never has seen

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[4] See Note, "Appealability in the Federal Courts", (1961) 75 Harvard L. Rev. 351.

fit to do so in connection with this Court's power of review over the state courts.

Moreover, as we have stated (p. 7, *supra*), the lack of finality stands as a bar to review either on appeal or on certiorari.

3. IN ANY EVENT, AT THIS INTERLOCUTORY STAGE OF THE PROCEEDING THIS COURT SHOULD NOT EXERCISE ANY POWER OF REVIEW

Even apart from the statutory question as to finality of judgment, 28 U.S.C. § 1257, the judgment being appealed from would bring the taxpayer's suit to this Court at such an interlocutory stage that the exercise of any power of review by this Court would be wholly inappropriate. As this Court said in *Rescue Army* v. *Municipal Court, supra,* 331 U.S. at 568—having there found the judgment sufficiently final to give this Court jurisdiction—"nevertheless compelling reasons exist for not exercising it"; and this Court accordingly dismissed the appeal.

Here the definitive answer to an important question of state law, heretofore unresolved, is about to be obtained as a result of this state court proceeding. The trial has now taken place; proposed findings and briefs were duly submitted to the trial judge; on January 9, 1964, the case was orally argued before the trial judge. The trial judge ruled that certain portions of the PUD's properties—namely, the gauge station—are electric properties within the meaning of the Washington statute; that the remainder of the PUD properties are not; but that the federal supremacy doctrine permits Seattle to condemn the electric properties despite the prohibition contained in the Washington statute. As soon as the trial judge makes

formal findings and conclusions, and enters formal judgment on the merits in favor of Seattle, appeal to the Washington Supreme Court will be taken.

Until the trial court's judgment has been reviewed on appeal by the Washington Supreme Court, the kind of relief, if any, which will be granted against Seattle will not be known and the exact relationship between that relief and the claimed scope of the judgment in the federal licensing proceeding will be a matter of guesswork rather than certainty. Furthermore, there is always the possibility that changes of circumstances will occur which will make it unnecessary for the Washington Supreme Court to render a final judgment and hence unnecessary for this Court to decide the complex federal questions which Seattle claims the case involves.

The interlocutory review which Seattle now seeks in this Court is more likely to delay than to expedite the emergence of a clear definition of all such matters. Moreover, Seattle's extravagant claims (J.S., pp. 12-13) of the need for exceptional haste by this Court seem particularly unimpressive in view of the fact that about fifteen months could easily have been saved in this lawsuit if Seattle had allowed the case to go to trial promptly after the Washington Supreme Court, on July 12, 1962, first held that it must.[5] "Delusive interests of haste should not be permitted to obscure substantial requirements of orderly procedure." *Duke Power Co.* v. *Greenwood Co.*, 299 U.S. 259, 268.

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[5] Similarly, the Government's concern for meeting "a federally prescribed timetable" (Mem. Amicus, p. 11) would have been more appropriately expressed if, back in July 1962, the Federal Power Commission had begun to urge that Seattle expedite this lawsuit instead of delaying it.

As *Rescue Army* shows, it would be premature for the Court to entertain an appeal at this stage of this proceeding; and in connection with review on certiorari, where there is greater scope for the discretionary element in the Court's jurisdiction, the same considerations are even more compelling against accepting the case now.

4. THIS APPEAL HAS BECOME MOOT

The Washington Supreme Court judgment being appealed from directs the trial court to follow previously-issued instructions and try this taxpayer's suit on the merits (J.S., p. A-15).

After the Washington Supreme Court entered this judgment, Seattle sought to obtain a stay. Its stay applications were denied successively by the Washington Supreme Court and by Mr. Justice Douglas (J.S., p. 13). The effect of denying the stay was to allow the case to proceed to trial, as ordered. The trial court then did proceed with the trial, thereby complying with the mandamus judgment Seattle here is appealing from. The trial by now has been completed and the trial court has made its ruling (see p. 17, *supra*).

Thus the mandamus order has fully performed its function; the trial judge has obeyed it in every respect. As in other cases where mandamus orders have been complied with while an appeal is pending, in this case there now does not remain any substantial subject matter of the present appeal from the Washington Supreme Court's judgment granting mandamus. *Brownlow* v. *Schwartz*, 261 U.S. 216; *Codlin* v. *Kohlhausen*, 181 U.S. 151; *Norwegian Co.* v. *Tariff Comm.*, 274 U.S. 106, 110-112. What the Court said in *Brown-*

low v. *Schwartz*, *supra*, 261 U.S. at 217, is equally applicable here: "An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other."

Accordingly this appeal should be dismissed. *Castellano* v. *Commission of Investigation of the State of New York*, 361 U.S. 7; *Voltaggio* v. *Caputo*, 371 U.S. 232; *Ditson* v. *California*, 372 U.S. 933. For the same reasons, review on certiorari should not be entertained.

5. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE JUDGMENT BEING APPEALED FROM

A. Requiring That Seattle Proceed to Trial Does Not Raise a Substantial Federal Question

By this time, as we have noted (p. 17, *supra*), the trial has been fully completed. But even if the trial had not yet occurred, it is clear that requiring Seattle merely to proceed to trial would not raise any issue reviewable by this Court. *Petroleum Co.* v. *Comm'n*, 304 U.S. 209, 222; *Allen* v. *Grand Cent. Aircraft Co.*, 347 U.S. 535, 540, and cases cited; compare *Rescue Army* v. *Municipal Court*, *supra*, 331 U.S. at 584; *Parr* v. *United States*, 351 U.S. 513, 519-520.[6] The issue is not a substantial federal question. Accordingly, it presents no ground for review either on appeal or on certiorari.

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[6] Conversely, there should be noted the heavy degree of protection which the Federal Power Commission enjoys against judicial review of its own non-final orders which impose a hearing upon a respondent who is contesting the Commission's jurisdiction. *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375; compare *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51-52.

In the course of reviewing the issuance of Seattle's license, the District of Columbia Circuit concluded that, because of Section 21 of the Federal Power Act, Seattle would obtain a right to defy the state statutory restriction on its charter. In the present taxpayer's suit, on the other hand, the Washington Supreme Court concluded that no such right would be conferred on Seattle if the state statutory restriction is found to cover the PUD properties. Particularly in view of these conflicting approaches, a substantial question would emerge if the Washington Supreme Court determines that the state statute does cover the PUD properties and that Seattle has no right to condemn them. But, as already indicated (pp. 7-19, *supra*), it would be premature at this stage for this Court to review Seattle's claim that the Washington state courts are not giving sufficient effect to the federal judgment.

B. A Final Judgment, if Rendered Against Seattle, Will Not Contravene the Res Judicata Principles Expressed in This Court's Tacoma Decision or Elsewhere

Despite the prematurity of the question, it may be helpful if we respond now, and in advance, to Seattle's argument, looking ahead to the possibility that the Washington Supreme Court's final judgment on the merits will be adverse to Seattle. Such a final judgment would not—as Seattle has been claiming—constitute an "impermissible collateral attack" on the federal licensing proceeding.[7]

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[7] The federal licensing proceeding is reported as *City of Seattle*, 26 FPC 54, 61, 463, affirmed, *Public Utility District No. 1 of Pend Oreille County* v. *Federal Power Commission*, 308 F. 2d 318, certiorari denied, 372 U.S. 908, rehearing denied, 372 U.S. 956, motion for leave to file second petition for rehearing denied, 375 U.S. 871 (No. 611, October Term 1962).

Seattle's claim stems from basic misconceptions as to what the federal licensing proceeding actually did or could conclusively determine and as to whom it actually did or could conclusively bind.

The federal licensing proceeding did adjudicate conclusively (although, for the reasons we have set forth in No. 611 of 1962 Term, in our view the adjudication was erroneous) that the license issued by the Federal Power Commission to Seattle was validly issued.[8] But certainly it did not and could not adjudicate conclusively that the Washington state courts are powerless to grant relief against Seattle if—after full trial on the merits of the already-pending taxpayer's suit brought by a taxpayer not a party to the licensing proceeding—they find that Seattle's proposed condemnation of the PUD properties violates the affirmative statutory prohibition which the Washington Supreme Court describes (J.S., p. C-4) as "clearly a declaration of the public policy of the state, dating back thirty years, and . . . in no sense an attempt to exercise a veto over said project."

Both Seattle (J.S., pp. 18-20) and the Government (Mem. Amicus, pp. 13-16) rely heavily on the *Tacoma* litigation[9] for their claim that the federal licensing proceeding would preclude the state courts from enter-

[8] The conclusiveness of that adjudication is subject to the qualification that the matter would be open to further review in the event that this Court were to vacate the denial of certiorari in No. 611 of 1962 Term.

[9] *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (No. 509 of October Term 1957), preceded by *State of Washington Department of Game* v. *Federal Power Comm'n*, 207 F. 2d 391 (9th Cir. 1953), certiorari denied, 347 U.S. 936 (No. 514 of October Term 1953).

ing judgment against Seattle in this taxpayer's suit. But *Tacoma* was a very different case. In the light of these differences, the res judicata doctrine which *Tacoma* developed in no way controls the ultimate disposition of the present taxpayer's suit.

1. Preliminarily it should be noted that, unlike the present case, *Tacoma* did not involve any issue as to whether the state courts could proceed with a trial. *Tacoma* came to this Court only after the Washington Supreme Court's final judgment on the merits.[10]

2. In *Tacoma* the State of Washington had actually appeared both before the Federal Power Commission and before the Ninth Circuit. In addition, as this Court noted (357 U.S. at 326), the State's Attorney General had appointed a Special Assistant Attorney General "to represent all persons of the State whose views were in conflict with the State's official position."[11] This Court held in *Tacoma* that the State of Washington had represented all its citizens, expressly relying (357 U.S. at 340-341) on a long line of decisions to the effect that, as *parens patriae*, a State does represent the interests of its citizens in various matters.

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[10] See the *Tacoma* record, No. 509 of October Term 1957, at R. 260-262 for the state trial court's judgment, and at R. 372-373 for the Washington Supreme Court's judgment of affirmance.

[11] This had, moreover, enabled the respondents, in opposing the petition for certiorari to the Ninth Circuit, to say: "Thus the State of Washington by its Attorney General and the people of Washington holding views opposed to the State's departmental position were represented at the hearings before the Federal Power Commission." (Brief for the Federal Power Commission and the City of Tacoma in Opposition, p. 5, in *State of Washington Department of Game* v. *Federal Power Commission*, No. 514 of October Term 1953).

Here, on the other hand, neither the plaintiff Beezer nor any other taxpayer of Seattle appeared either before the Commission or before the Court of Appeals; and no one ever did represent, or was designated to represent, those citizens and taxpayers of Seattle whose views might be opposed to the City's official position. Nothing is cited to support the Government's far-fetched claim (Mem. Amicus, pp. 14-15) that Beezer must be deemed to have "accepted the representation of the City of Seattle" in the licensing proceeding and "cannot now object that the City adopted a litigating position different from that he would have chosen."

Beezer is not challenging the validity of Seattle's license; he is seeking to require Seattle to live within its charter. As a stranger to the federal licensing proceeding he is not bound by determinations which the District of Columbia Circuit may there have made on subsidiary issues of law when it decided the license had been validly issued. In holding that res judicata does not apply to this taxpayer's suit because "the subject matter, the parties, and the purpose of the proceedings are different" (J.S., p. A-6), the Washington Supreme Court has the support not only of Washington decisions on which it relied (see p. 35, *infra*), but also of the long line of decisions in this Court establishing that those who are not parties or their privies, or are not adequately represented by parties, do not become bound. See, *e.g.*, *Gratiot County State Bank* v. *Johnson*, 249 U.S. 246; *United States* v. *Pink*, 315 U.S. 203, 216; *Hinderlider* v. *La Plata Co.*, 304 U.S. 92, 103; *Washington* v. *Oregon*, 297 U.S. 517, 528-529; *Western U. Tel. Co.* v. *Foster*, 247 U.S. 105, 115; *Western Union Co.* v. *Pennsylvania*, 368 U.S. 71, 75; *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 690-692.

As the Washington Supreme Court has made clear, this taxpayer's suit instead raises the question whether Seattle's officials shall be prevented from violating a fundamental statutory restriction on Seattle's powers—a question in which, under Washington law, the taxpayers of Seattle have a proper interest and the right to enforce that interest by suit. In such a suit Beezer clearly is not foreclosed from raising the applicability of the state statutory restriction even though that matter may have been the subject of consideration in the federal licensing proceeding to which he was not a party.

Mr. Justice Brandeis' opinion for the Court in *Gratiot County State Bank* v. *Johnson*, *supra*, 249 U.S. 246, is instructive on this point that "persons who might have made themselves parties to a litigation between strangers but did not, are not bound by the judgment".[12] The more recent decisions of the Court

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[12] There the federal court in making its adjudication of bankruptcy had determined that the bankrupt had been insolvent during the entire four-month period prior to the filing of the bankruptcy petition. This Court held that in a subsequent state court suit to recover from the creditor an alleged preferential payment which the bankrupt made to him during the four-month period, the creditor nevertheless remained free to contest whether the bankrupt actually had been insolvent at the time the payment was made. The Court held that even though a federal court's adjudication of bankruptcy is "conclusive upon all the world", nevertheless it "is not res judicata as to the facts or as to the subsidiary questions of law on which it is based, except as between parties to the proceeding or privies thereto"; and that a creditor, although he had a right to intervene in the bankruptcy proceedings, "unless he exercises the right to become a party, he remains a stranger to the litigation, and, as such, unaffected by the decision of even essential subsidiary issues", it being the general rule that "persons who might have made themselves parties to a litigation between strangers but did not, are not bound by the judgment" (249 U.S. at 248-250).

emphasizing the proper limits on the scope of res judicata and collateral estoppel are fully in accord. *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322; *Kersh Lake Drainage Dist.* v. *Johnson*, 309 U.S. 485, 492-495; compare *Yates* v. *United States*, 354 U.S. 298, 335-338.

3. The state law issue which brought *Tacoma* to this Court was whether the City of Tacoma lacked capacity to condemn State-owned land. This issue never even was raised in the state court until long after Tacoma's federal licensing proceeding had run its entire course through the end of the process of judicial review.[13] Hence it had the appearance of a tardy afterthought, raised belatedly after the completion of a federal licensing proceeding in which the State of Washington and all its citizens had actually enjoyed the benefits of a full day in court (see p. 23, *supra*).[14] Here, on the other hand, the taxpayer's suit was filed in the state

[13] The Ninth Circuit's decision was rendered October 5, 1953; certiorari was denied April 5, 1954, (see note 9, supra). The record in *Tacoma* shows that, although the state court proceeding had been pending since February 3, 1952, nevertheless the first time that the issue as to the capacity of the City of Tacoma to condemn State-owned land was raised in the state court proceeding was on August 29, 1955, by the defendants' answer and cross-complaint to plaintiff's amended complaint (R. 168-174 in No. 509, October Term 1957).

[14] Another exceptional circumstance in *Tacoma* was that the state court suit had gone up to the Washington Supreme Court on an initial appeal in which the City of Tacoma's position was sustained in a decision rendered October 14, 1953; and in reliance on that decision the City had accepted bids on a block of its revenue bonds (357 U.S. at 329-330). It was only thereafter that the state law issue as to Tacoma's lack of capacity to condemn State-owned land had been belatedly raised for the first time as an issue in the state-court litigation; and on this belatedly-raised ground, the City then lost the case in the Washington Supreme Court following a change in that court's composition (357 U.S. at 332, note 14).

court November 29, 1961 (R. 0001), shortly after the Federal Power Commission's decision and order and while the case was pending at a preliminary stage on petition for review in the Court of Appeals.[15] In every respect Beezer's raising of the issue by instituting this taxpayer's suit was timely.

4. Here (unlike the situation of the Ninth Circuit in *Tacoma*) the District of Columbia Circuit was fully aware not only of the pendency of this state law issue in the taxpayer's suit in the state court but also of the views expressed by the Washington Supreme Court in its July 12, 1962, decision (reproduced here in J.S., Appendix C), to the effect that this state law issue must proceed to trial.[16] Despite this, the District of Columbia Circuit said nothing to indicate that it thought the trial of the taxpayer's suit in the state court should not proceed. Nor did it say anything indicating that its decision was intended in some way to foreclose further inquiry and adjudication by the state courts in this taxpayer's suit, which was not challenging the validity of Seattle's license and which had been initiated by a taxpayer not a party to the federal licensing proceeding. If the District of Columbia

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[15] The taxpayer's suit was filed by Beezer in the state court before the Federal Power Commission, on December 15, 1961, had filed in the District of Columbia Circuit its certificate of record of the proceedings before the Commission.

[16] The parties' briefs in the District of Columbia Circuit referred to the pendency and status of the *Beezer* case. A motion to stay the proceedings in the District of Columbia Circuit, pending the outcome of the *Beezer* case, was denied by the District of Columbia Circuit. The July 12, 1962, decision of the Washington Supreme Court in the *Beezer* case (J. S., Appendix C) was lodged with the District of Columbia Circuit on July 16, 1962, about a month and a half before the District of Columbia Circuit rendered its decision.

Circuit actually had intended its judgment to have any such far-reaching effect—an effect which, for the reasons we have indicated (pp. 24-26, *supra*), would have been well beyond the scope of its power—then in the actual posture of this case its omission to say so, seems extraordinary. In any event, such an intention should not lightly be inferred. The more reasonable interpretation is that no such intention existed. Compare *Kersh Lake Drainage District* v. *Johnson, supra,* 309 U.S. at 492-495; *United States* v. *Wallace & Tiernan Co.,* 336 U.S. 793, 801-803.

5. The state law issue here is of a very different nature from the one involved in *Tacoma.* As the Washington Supreme Court here has pointed out (J.S., p. C-3, "when the city of Tacoma received its license to proceed with the Cowlitz project and construct the necessary dams, there was nothing limiting its authority so to do." In other words, in *Tacoma* the City of Tacoma merely lacked express authority to condemn State-owned land—a gap which Section 21 of the Federal Power Act could fill without doing violence to the traditional division of authority between the states and the Federal Government. Nothing in the *Tacoma* decision involved an invasion of the sovereignty of the State. It was under such circumstances that the federal licensing proceeding, in which the State of Washington and all its citizens had been fully represented (see p. 23, *supra*), was deemed finally determinative of the issue as to whether the gap was thus filled.

Here, on the other hand, the state law issue arises not because of a gap but because of a strong affirmative prohibition which expresses the State's long-standing policy. As the Washington Supreme Court said (J.S., p. C-3), Seattle "had a known and express limitation

on its power, i.e., it could not condemn '. . . the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated . . . by a public utility district.' " The reach of this express statutory limitation on Seattle's municipal charter is peculiarly an intrastate matter and should not be deemed finally foreclosed by a federal licensing proceeding. The state courts provide the most suitable forum for developing a full record and exploring the complexities and the ramifications of a controversy of this kind—a controversy which involves, essentially, the extent of the State of Washington's legislative control over the relationships between two municipal corporations which are both political subdivisions of the State. Anything said on this matter during the course of the federal licensing proceeding should be regarded as subject to further consideration in the light of final pronouncements by the Washington Supreme Court, which now (see pp. 17-18, *supra*) will have an opportunity to decide whether the trial court's dismissal of the complaint after a full trial on the merits should be reversed.[17] The fundamental nature of the controversy, and its importance in federal-state relationships, make it in any event unsuitable to regard the federal licensing proceeding as res judicata upon such an issue.

If despite these important distinctions it nevertheless should be thought that something said in *Tacoma* does reach out to cover the present taxpayer's suit, then we suggest that any such portions of *Tacoma* be

[17] Compare this Court's ruling, though in a somewhat different situation, in *Blair* v. *Commissioner*, 300 U.S. 5, 9, that "after the decision in the first proceeding, the opinion and decree of the state court created a new situation" which "cannot justly be ignored."

reexamined. In *Tacoma* the briefs of the respondents in this Court were exceptionally meager in dealing with the res judicata issue—the sole issue on which this Court rested its decision. A more extensive briefing than occurred in that case would, we feel, be of help in establishing the limits to be placed on the doctrine of res judicata and the strong reasons why—regardless of what the *Tacoma* opinion may or may not be thought to say—the res judicata doctrine should not be pressed to the extreme of covering a case such as the present one. In recent years res judicata has been given broad scope. See, e.g., *Durfee* v. *Duke*, 375 U.S. 106, and cases cited; *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371. But the Court always has recognized that the command of res judicata is not inexorable, and that various situations do arise where considerations of fairness or of the public interest require that the doctrine not be given controlling force. See, e.g., *United States* v. *R.C.A.*, 358 U.S. 334; *Labor Board* v. *Denver Bldg. Council*, 341 U.S. 675, 682-683; *Yates* v. *United States*, 354 U.S. 298, 335-338; *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416; *Kovacs* v. *Brewer*, 356 U.S. 604; *Fay* v. *Noia*, 372 U.S. 391, 422-424; *Accardi* v. *Shaughnessy*, 347 U.S. 260, 263-264; *Kalb* v. *Feuerstein*, 308 U.S. 433; *United States* v. *Stone & D. Co.*, 274 U.S. 225, 230-237; *Mercoid Corp.* v. *Mid-Continent Inv. Co.*, 320 U.S. 661, 669-671. If the Washington Supreme Court decides that the PUD properties are covered by the Washington statute, then there is an overriding public interest that this case be decided correctly on the merits.

C. A Final Judgment, if Rendered Against Seattle, Would Be Correct in Determining That Section 21 of the Federal Power Act Does Not Confer on Seattle a Right to Defy the Statutory Limitation of Its Charter

We turn to the last question discussed by Seattle (J.S., pp. 4, 17-21)—the question on which the Washington Supreme Court has expressed its total disagreement with the District of Columbia Circuit. This question is whether Section 21 of the Federal Power Act confers on Seattle a right to defy the prohibition whereby the Washington legislature, by legislation applicable to all Washington cities (RCW § 35.84.030), has affirmatively prohibited Seattle from condemning electric properties of the PUD.

For reasons we have indicated (pp. 7-19, *supra*), this federal question is premature at this time. But whenever it does become or be deemed ripe for review in this proceeding, we fully agree that it is a question of great importance. It is our submission that on the merits of this important matter of federal-state relationships, the Washington Supreme Court is clearly right and the District of Columbia Circuit is clearly wrong. We shall summarize our position here, in view of the frivolous claim now being made by Seattle (J.S., pp. 17-21) that the Washington Supreme Court's views on this matter are "contrary to long established principles set forth by this Court."

The only two decisions of this Court which Seattle cites in support of such a remarkable assertion are *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, and the earlier decision in *First Iowa Coop.* v. *Power Comm'n*, 328 U.S. 152. In *Tacoma*, as we have already seen (pp. 22-30, *supra*), this Court's decision rested solely on the res judicata ground that, because of the con-

trolling effect of the particular judgment in the prior federal licensing proceedings, the state court was foreclosed from making a decision on the merits. This Court's opinion was careful not to pass upon, or intimate any view upon, the merits of the question whether Section 21 of the Federal Power Act should be interpreted as conferring upon the City of Tacoma a right to condemn State-owned land when the Washington legislature had omitted to make an express grant of such power to the City. And in addition, the issue in *Tacoma* on the merits—even if it had been reached by this Court—would have involved merely a gap in state law and not, as here, an affirmative statutory prohibition (see p. 28, *supra*). The importance of the distinction has long been recognized; as this Court said in *Dallemagne* v. *Moisan*, 197 U.S. 169, 174:

> "It has long been held that power may be conferred upon a state officer, as such, to execute a duty imposed under an Act of Congress, and the officer may execute the same, unless its execution is prohibited by the Constitution or legislation of the State."

With respect to *First Iowa*, that case involved a state law which forbade the construction of a dam in a navigable stream without obtaining a permit from a State executive council; quite naturally, this Court (328 U.S. at 164) held the state law to be a "veto" law which was superseded by the Federal Power Act. Here, however, the Washington statute makes no reference to a dam or a navigable river; it is in no sense a "veto" law; it is not aimed at prohibiting the development of a project at Boundary; it simply prohibits Washington cities from condemning the electric properties of Washington public utility districts; and

no Washington statute prohibits anyone else from making such condemnation.

This Court's opinion in *First Iowa* states expressly (328 U.S. at 178): "The need for compliance with applicable state laws, if any, arises not from this federal statute but from the effectiveness of the state statutes themselves." It thus gives direct support to the views expressed here by the Washington Supreme Court, to the effect that this Washington statute (if it is found on the evidence to apply to the facts of this case) would be effective to prevent Seattle from acquiring a right to condemn the PUD properties. Indeed, there is virtually no state law which could be entitled to a greater "effectiveness" than a statute by which the State fixes and controls the powers and relationships of its own municipal corporations, one against the other. This Court repeatedly has declared and sustained the sovereign power of a State to control the activities of its own municipal corporations. *Hunter* v. *Pittsburgh*, 207 U.S. 161, 178-179; *Pawhuska* v. *Pawhuska Oil Co.*, 250 U.S. 394, 397-399; *Williams* v. *Mayor*, 289 U.S. 36, 40. Subject to the narrow exceptions necessary to prevent federal constitutional guaranties from being "manipulated out of existence", *Gomillion* v. *Lightfoot*, 364 U.S. 339, 345, it is the State and not the Federal Government which determines and controls what powers shall be conferred on, and what powers shall be prohibited to, the State's municipalities.

Rights conferred by Section 21 of the Federal Power Act should be interpreted in a manner which will be harmonious with this fundamental principle and will avoid serious constitutional questions. Nothing in the legislative history of the Federal Power Act provides

any justification for the extraordinary view taken by the District of Columbia Circuit. Instead, the matter calls for application of this Court's strong admonition that "In a dual system of government in which, under the Constitution, the States are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress". *Parker* v. *Brown,* 317 U.S. 341, 351; see also *Penn-Dairies* v. *Milk Control Comm'n,* 318 U.S. 261, 275; *Huron Cement Co.* v. *Detroit,* 362 U.S. 440, 443. The Court emphasized in *First Iowa, supra,* 328 U.S. at 171, and later reiterated in *Power Comm'n* v. *Niagara Mohawk Power Co.,* 347 U.S. 239, 251, that the Federal Power Act "discloses both a vigorous determination of Congress to make progress with the development of the long idle water power resources of the Nation and a determination to avoid unconstitutional invasion of the jurisdiction of the States", and that the Act "leaves to the States their traditional jurisdiction subject to the admittedly superior right of the Federal Government, through Congress, to regulate interstate and foreign commerce."

It is the Washington Supreme Court, not the District of Columbia Circuit, which has come to the only conclusion consistent with these basic principles. Certainly the Washington Supreme Court would not be obliged to defer to the views of any federal court of appeals on the merits of this question when it deems those views to be incorrect. The Washington Supreme Court was fully justified in stating that "in the construction of federal statutes only the decisions of the Supreme Court of the United States are binding upon us", and that this particular question "presents a prob-

lem in federal-state relationships which can be decisively answered only by the United States Supreme Court "(J.S., p. A-5).

6. THE JUDGMENT RESTS ON AN ADEQUATE NONFEDERAL GROUND

Among the grounds on which its decision rests, the Washington Supreme Court has held (J.S., p. A-6; see p. 24, *supra*) that the decision of the District of Columbia Circuit in the federal licensing proceeding is not res judicata in the present taxpayer's suit because "the subject matter, the parties, and the purpose of the proceedings are different." In support of its conclusion on this point the Washington Supreme Court relied on two of its prior decisions.[18]

Particularly under the circumstances presented by this record, the ruling of the Washington Supreme Court, holding that res judicata does not operate as a bar, is not only a tenable but a clearly correct ruling on a matter of state law and procedure; it comports with settled principles of law (see pp. 23-26, *supra*); and it constitutes an adequate nonfederal ground to support the judgment that this taxpayer's suit should proceed to trial on the merits.

This adequate nonfederal ground defeats review of the present judgment either on appeal or on certiorari.

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[18] *Burke Motor Co.* v. *Lillie*, 39 Wn. 2d 918, 239 P. 2d 854 (1952), and *Curtiss* v. *Crooks*, 190 Wash. 43, 66 P. 2d 1140 (1937).

CONCLUSION

For the reasons we have set forth in this motion, it is our position that

(1) The appeal should be dismissed.

(2) If the Court were to treat the appeal papers as a petition for certiorari (although, in our view, there is no basis for doing so), then certiorari should be denied.

Respectfully submitted,

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APPENDIX A

"Questions Presented" Portion of Seattle's Notice of Appeal To This Court

The following questions are presented by this appeal:

1. Where the Federal Power Commission has issued a license to the City of Seattle for the construction of a hydroelectric project on a navigable stream and the Court of Appeals for the District of Columbia Circuit on the direct review proceedings thereof under Section 313(b) of the Federal Power Act, has held that Section 21 of the Act grants Federal eminent domain powers to the City to condemn lands necessary for the project regardless of a State law (RCW 35.84.030) argued to bar their condemnation and this court has denied certiorari, may the judgment of the Court of Appeals be collaterally attacked by a separate taxpayer's action in the Washington State Court, or is the final Federal judgment conclusive upon the State proceedings?

2. Whether the sole issue raised by this taxpayer's action, as to the power of the City, under RCW 35.84.030, to condemn the PUD lands necessary to construction of the City's FPC licensed Boundary Project, was rendered moot by the decision and judgment of the Court of Appeals for the District of Columbia Circuit, certiorari denied, which upheld the City's power to take the property in question under Section 21 of the Federal Power Act,

If the Federal judgment is not conclusive or does not render the State proceedings moot, the further question is presented:

3. Whether Seattle, as an FPC licensee, can acquire by condemnation under Section 21 of the Federal Power Act lands owned by the PUD necessary for construction of Boundary Project, or whether this power is overridden by a Washington statute (RCW 35.84.030), alleged to deprive a city from condemning an "electric power and light plant or electric system" owned by a PUD.